Editor's note: appeal filed sub nom. Mary Akootchook v. United States, Civ. No. A98-0126 (D. Alaska April 22, 1998); dismissed, (claims barred by res judicata effect of two class actions) (Nov. 2, 1999); relief from judgment denied, (Feb. 1, 2000); appeal filed, No. 00-35325 (9th Cir. April 3, 2000), aff'd (Nov. 8, 2001), 271 F.3d 1160.

UNITED STATES
v.
GEORGE JIM, SR.

IBLA 94-429 Decided December 12, 1995

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., denying Native allotment application. AA-6561.

Affirmed.

1. Alaska: Native Allotments--Evidence: Preponderance

A Native allotment application is properly denied where the preponderance of the evidence establishes that the applicant did not engage in qualifying use and occupancy as an independent citizen, but as a minor child in the company of and under the supervision of his parents and other family members, prior to withdrawal of the land from entry.

APPEARANCES: Marlyn J. Twitchell, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

George Jim, Sr., has appealed from a March 21, 1994, decision of Administrative Law Judge John R. Rampton, Jr., denying his Native allotment application (AA-6561). 1/ The case turns on whether Jim engaged in qualifying use and occupancy on the land encompassed by his application prior to the February 16, 1909, withdrawal of that land.

In his Native allotment application filed on July 5, 1971, Jim (or Claykouthks), a Tlingit Indian, sought 142.36 acres of land situated on Admiralty Island between Florence Lake and the Chatham Strait, pursuant

1/ By order dated Jan. 10, 1995, we granted expedited consideration.

to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 2/ The land was withdrawn on February 16, 1909, from entry under the Act of May 17, 1906, by Presidential Proclamation No. 846, 35 Stat. 2226-28 (1909), which enlarged the Tongass National Forest. See 35 Stat. 2152 (1909).

According to his own recollection, Jim was born on or about May 15, 1902 (Exh. 1 at 2, Exh. 11 at 2, Exh. 17 at 1; Tr. 106-09) and was therefore just under 7 years of age at the time of the withdrawal. He asserted in his allotment application that he had used and occupied the land since 1910 during frequent seasonal visits for picking berries and gathering wild greens (summer), hunting (fall), and trapping (winter) (Exh. 1 at 1-3). 3/ Prior to that time, he stated that the land had been used for the same purposes by his maternal uncle (Yanushtok), who lived on the land throughout the year. His uncle's period of use and occupancy began in 1870 and continued until his death in 1925. Jim further stated:

> My maternal uncle * * * was the traditional owner of this tract, which we call "Wutbuskexnee" (meaning "rocks at mouth of creek"). He maintained a cabin there, where he lived throughout his life as his primary place of residence. * * * I was born in 1902, and started making regular seasonal visits to this tract and neighboring areas when I was still a small boy. When my uncle died in 1925, I was given his Indian name along with traditional ownership of Wutbuskexnee. [4/]

(Exh. 1 at 2).

On September 23, 1992, the Bureau of Land Management (BLM) filed a complaint, charging that Jim had not initiated either independent use and occupancy or substantial use and occupancy on the subject land at least potentially exclusive of others prior to the February 16, 1909, withdrawal and was therefore not entitled to a Native allotment. Jim denied the

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2/ The land is described as lot 4, S½ SE¼ sec. 10, fractional W½ SW¼ SW¼ sec. 11, T. 47 S., R. 66 E., Copper River Meridian, Alaska.

The Act of May 17, 1906, was repealed effective Dec. 18, 1971 (subject to allotment applications pending on that date), pursuant to section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988).

3/ Since Jim neither reads nor writes English, his allotment application was prepared with the assistance of Lydia George, who interpreted for him (Tr. 124-25, 143-44, 152-53). She testified that, in so doing, she "only wrote down what [Jim] told me" (Tr. 149). There is no evidence that there was any error in translation. We accordingly accept the statements contained therein as Jim's.

4/ The land is elsewhere called by Jim "Wha ta sa kta" (Exh. 17 at 1).

charges, and the case was set for hearing before Judge Rampton in Angoon, Alaska, on June 8, 1993.

After considering all of the testimony and other evidence presented at the hearing and the briefs submitted by the parties, Judge Rampton concluded in his March 1994 decision that Jim had failed to establish by a preponderance of the evidence that he had engaged in independent use and occupancy of the subject land prior to the February 16, 1909, withdrawal. Jim appealed.

[1] In order to be entitled to a Native allotment under the Act of May 17, 1906, appellant must establish that he was engaged in qualifying use and occupancy prior to the withdrawal of the subject land on February 16, 1909, coincident with the enlargement of the Tongass National Forest. See Shields v. United States, 698 F.2d 987, 989 (9th Cir. 1983), cert. denied, 464 U.S. 816 (1983); United States v. Mary T. Akootchook, 123 IBLA 6, 7-8, 10-11 (1992). Section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), required a Native allotment applicant to submit satisfactory proof that he had engaged in "substantially continuous use and occupancy of the land for a period of five years." Such use and occupancy was defined by Departmental regulations to be "substantial actual possession and use of the land, at least potentially exclusive of others." 43 CFR 2561.0-5(a).

However, the question is not whether appellant completed the 5 years of qualifying use and occupancy, but solely whether he had initiated such use and occupancy prior to the February 16, 1909, withdrawal. BLM charged in its complaint and proved to Judge Rampton's satisfaction that appellant had failed to do so. We agree.

Qualifying use and occupancy, as interpreted by the Board, is established where it is "by the applicant as an independent citizen acting on his or her own behalf or as head of a family, and, not as a minor child in the company of and under the supervision of one's parents" and/or other family members. United States v. Mary T. Akootchook, 123 IBLA at 8 (emphasis added); 5/ see also United States v. Daniel Akootchook, 130 IBLA 5, 7 (1994); Arthur C. Nelson (On Reconsideration), 15 IBLA 76, 78 (1974).

5/ This case gave rise to a decision by the Circuit Court in Akootchook v. United States, 747 F.2d 1316 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985). The Court upheld the Department's refusal to consider various allotment applications, but did not specifically rule on whether the Native applicants had qualifying use and occupancy as minor children prior to the date of withdrawal since applicants had relied on their ancestor's use and occupancy prior to that date. See 747 F.2d at 1318-19. However, the Court was aware (as one of the three-member circuit court panel expressly noted) that the applicants had begun to use and occupy the land as minor

The District Court overruled the Department's holding in Jimmie A. George, Sr., 60 IBLA 14 (1981), that qualifying use and occupancy must be as an independent citizen, potentially exclusive of immediate family members. George v. Hodel, No. A86-113 (D. Alaska Apr. 30, 1987). However, we have distinguished George on the basis that there was evidence in that case that the Native applicant had engaged in independent use and occupancy prior to the withdrawal date. See United States v. Mary T. Akootchook, 123 IBLA at 11-12. The applicant in George was over 19 years old at the time of the withdrawal and was considered to an adult under Tlingit law at that time, which set the age of majority at 12. Jimmie A. George, Sr., 60 IBLA at 14-17. There is no such evidence here. To the contrary, the evidence is that appellant did not engage in independent use and occupancy prior to the withdrawal date.

We have held that a 5-year old child is too young, as a matter of law, to be able to engage in independent use and occupancy. Floyd L. Anderson, Sr., 41 IBLA 280, 283, 86 I.D. 345, 347 (1979). However, we have also held that a child 8 years of age or older is entitled to an opportunity to demonstrate that, by virtue of his general capacity and actual activities on the land, he engaged in independent use and occupancy. See William Bouwens, 46 IBLA 366, 370 (1980). Similarly, we believe that a child nearing the age of 7 years is entitled to that same opportunity. See United States v. Mary T. Akootchook, 123 IBLA at 10.

Judge Rampton afforded that opportunity to appellant (Decision at 8). We find this especially appropriate, as there is some doubt regarding appellant's age in February 1909. The finding that appellant was just under 7 years of age depends entirely on his recollection of his birth date, which he placed at the time of a shipwreck (Tr. 107-09). Understandably, there is some uncertainty both about the date of the shipwreck and

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fn. 5 (continued)
children, in the company of their families, prior to the withdrawals. 747 F.2d at 1321-22. This fact notwithstanding, the Circuit Court affirmed the District Court's ruling that the applicants had no rights to an allotment because their "individual use and occupancy * * * began after an effective withdrawal." 747 F.2d at 1318, 1321 (emphasis added). In addition, the Court specifically held that they did not have valid rights pre-dating the withdrawals. See id. at 1320.

Appellant attempts to distinguish Akootchook on the basis that it hinged on our finding that the Native applicants were "always in the company of a parent or an older sibling, who did the actual fishing and hunting." 123 IBLA at 9 (emphasis added). We disagree with that restricted reading of Akootchook, as the evidence in that case established also that the applicants had assisted in those efforts to the best of their ability. Although the applicants engaged in personal use, they did so under the supervision of others. That is not independent use.

about the relation between that event and his birth date, as this information was conveyed to appellant at an earlier time by an unidentified relative (Tr. 108). There is no independent confirmation of either fact. 6/

Having afforded appellant the opportunity to demonstrate his independent use and occupancy prior to February 16, 1909, Judge Rampton concluded that he had failed to do so by a preponderance of the evidence:

> Contestee used the land prior to withdrawal as a minor -- only 7 years old -- in the company of his parents, with no showing that his use, at such a young age, was somehow independent of his parents' use. For the most part, the evidence indicates that he was helping his parents with subsistence activities. To the extent * * * he performed these activities without physical assistance from his parents, contestee has failed to meet his burden of showing that he was not under the supervision of his parents. Until his mother and uncle died, the land was under their control.

(Decision at 8).

Based on the evidence submitted by appellant, it is clear that his maternal uncle originally began to use and occupy the land in the latter half of the nineteenth century, well before appellant was born, building a cabin, living there year-round, and engaging in subsistence activities (Exh. 1 at 1-3, Exh. 11 at 2-3; Tr. 110-11). That use and occupancy continued until his uncle's death in 1925 (Exh. 1 at 1-2). Thus, at all relevant times, appellant's use and occupancy was overshadowed by that of his uncle.

Furthermore, prior to February 16, 1909, appellant's use (berry-picking, food-gathering, and fishing) and occupancy was always in the company of his mother, father, or uncle (Exh. 11 at 2, Exh. 15 at 1, Exh. 17 at 1, Exh. 21 at 3; Tr. 110-15, 118-19, 121, 123-24, 167, 170). It was not until appellant "became a teenager" that he began to engage in hunting and trapping during the fall and winter months (Exh. 1 at 2, Exh. 11 at 2; Tr. 113). Such use would have occurred at or around 1914, well after February 16, 1909.

There is also evidence that appellant believed he had acquired inchoate rights to the land shortly after his birth when he was taken to it, as a symbolic gesture, which rights then vested upon the death of his maternal uncle in 1925 (Exh. 1 at 2, Exh. 13; Tr. 110-11, 132-33, 137-39, 151-52,

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6/ BLM informs us on appeal that a shipwreck occurred on Feb. 4, 1903 (Answer at 3 n.2). However, as BLM recognizes, we do not know if this is the one to which appellant tied his birth date.

166, 174-75; Posthearing Reply Brief, Exh. CC, at 25, 53). 7/ He asserts that such right is recognized by other Tlingit Indians (Exh. 11 at 3, Exh. 14, Exh. 16 at 1, Exh. D at 1, 4, 5; Tr. 150-51, 173-74). Assuming arguendo that appellant had, as a result of completing the appropriate Native ritual, acquired rights to the land according to Tlingit custom prior to February 16, 1909, the standard imposed by 43 CFR 2561.0-5(a), as interpreted in cases such as Akootchook, does not incorporate the Native concept regarding rights to land. Thus, whether appellant had a traditional use right to the land as against other members of his family, clan, or tribe (Tlingit), it is clear that such use right does not operate against the United States. The only question presented here is whether BLM should grant appellant Federal title under the Native Allotment Act, and he has failed to demonstrate, by a preponderance of the evidence, that he used and occupied the land as an independent citizen prior to February 16, 1909, as required by that Act. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

7/ There are statements in the record indicating that appellant acquired his rights to the land upon the death of his mother in 1922. See, e.g., Tr. 133. However, it appears that appellant believed that he took rights in the land from his mother's side of the family (his maternal uncle) and/or that she acted as a trustee of his interest in the land until her death (Tr. 137-38; see also Posthearing Reply Brief at 5).

In Exhibit 13, appellant contradicted those statements, indicating that he took ownership upon the death of his "father" in 1908 (Exh. 13; see also Tr. 166).

Exhibit CC constitutes an extract from a book entitled "The Social Economy of the Tlingit Indians," by Kalervo Oderg. We cite to the pages of that extract.

8/ Although Judge Rampton stated simply that "the land was under" the control of appellant's mother and uncle, thus suggesting that they had rights thereto, the decision as a whole finds that use and occupancy of the land was under their control, since he was referring to the fact that appellant had failed to show that his use of the land was "not under the[ir] supervision" (Decision at 8 (emphasis added)).